

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
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In the Matter of

Petition of the Wireless Consumers Alliance, Inc. for a Declaratory Ruling concerning whether the provisions of the Communications Act of 1934, as amended, or the jurisdiction of the Federal Communications Commission thereunder, serve to preempt state courts from awarding monetary relief against commercial mobile radio service ("CMRS") providers (a) for violating state consumer protection laws prohibiting false advertising and other fraudulent business practices, and/or (b) in the context of contractual disputes and tort actions adjudicated under state contract and tort laws.

File No. \_\_\_\_\_

WT 99-263

TO: The Commission

**PETITION FOR DECLARATORY RULING**

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## **SUMMARY**

Petitioner the Wireless Consumers Alliance, Inc. ("Alliance" or "WCA"), is pursuing a class action lawsuit, filed in California state court, on behalf of consumers who subscribed to wireless telephone service provided by Los Angeles Cellular Telephone Company ("LA Cellular"), a commercial mobile radio service ("CMRS") provider licensed by the Federal Communications Commission ("FCC" or "Commission") to provide service in the Los Angeles, Riverside and San Bernardino counties of Southern California. The state court granted a motion by LA Cellular to strike the plaintiffs' prayer for damages based on violation of state consumer protection, tort and contract laws on the grounds that CMRS providers are immune from state monetary claims by virtue of the preemptive effect of the Communications Act of 1934, as amended (the "Communications Act") and supervening FCC jurisdiction. This ruling reflects the confusion regarding: (a) what constitutes rate regulation; and (b) misapplication of the policies of promoting competition which are the genesis of the rules, regulations and statutes which Congress and the Commission have enacted to encourage the forces of a free, fair and robustly competitive marketplace to determine the prices charged by CMRS providers for their services, rather than state rate regulation. The California court also implicitly accepted LA Cellular's argument that legal precedent developed under the "Filed Rate" doctrine applies to prevent the court from an award of damages which would directly or indirectly affect LA Cellular's "filed rates," which are within the exclusive province of the Commission's regulatory oversight of CMRS providers.

In sum, the state court accepted LA Cellular's contention that any action for damages against a CMRS provider can only be brought before the Commission or the U.S. District Court pursuant to the applicable provisions of the Communications Act, *i.e.*, state consumer protection, tort and contract laws do not apply to CMRS providers.

The California Court of Appeal has issued an order staying the above proceedings to enable WCA to seek a "ruling by the Federal Communications Commission on a petition for



a determination whether the Federal Communications Act preempts state courts from awarding monetary relief as a remedy for fraud and false advertising claims."<sup>1</sup> This petition seeks such a ruling. Generally, the Commission is requested to find and declare the CMRS providers are not endowed with a special status in the market place which shields them from state laws which regulate normal commercial practice by reason of the provisions of the Communications Act or the exercise of the Commission's jurisdiction. Specifically, the Commission is requested to rule that neither the Communications Act or the Commission's actions have preempted state court jurisdiction over CMRS providers to award monetary relief for violations of state laws which establish the standards for commercial practices for businesses operating with that state.

Such a ruling will be consistent with the Commission's determination that CMRS providers should be allowed to operate in a competitive environment governed by market place rules rather than being constrained by regulatory rate-making processes. The ruling will also provide necessary guidance to state courts who may be confused by the arguments that CMRS providers enjoy the benefits but not the obligations of participating in the market place by reason of the Communications Act and the Commission's jurisdiction.

The requested declaratory ruling concerns only a matter of law and existing Commission rulings. Consequently the Commission can issue the requested ruling without delving into the facts of the Petitioner's case pending before the California courts.

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<sup>1</sup> Spielholz v. The Superior Ct., No. B131655, Order Staying Proceedings, slip op. at 1 (Cal. Ct. App. June 15, 1999)

Petitioner the Wireless Consumers Alliance, Inc. (the "Alliance" or "WCA"), pursuant to §1.2 of the Rules of the Federal Communications Commission (the "FCC" or "Commission")<sup>1</sup> hereby respectfully requests that the Commission issue a ruling declaring that neither the provisions of the Communications Act of 1934, as amended (the "Communications Act"),<sup>2</sup> nor the FCC's jurisdiction thereunder, serve to preempt state courts from awarding monetary relief against commercial mobile radio service ("CMRS") providers for (a) violating state consumer protection laws prohibiting, inter alia, false advertising and other fraudulent business practices, and/or (b) wrongful conduct in the context of contractual disputes and tort actions adjudicated under state contract and tort laws. In support of their request, the Petitioner submits the following:

## **I. BACKGROUND**

### **A. Introduction**

#### **1. The Requested Ruling Is Of Immediate And Nationwide Importance**

This declaratory ruling is requested of the FCC to aid in the disposition of significant litigation brought on behalf of millions of consumers of wireless telephone service in the State of California, as well as in other states that **have not yet established** legal precedents rejecting the notion that Section 332(c)(3)(A) of the Communications Act<sup>3</sup> preempts state courts from awarding monetary relief against CMRS providers for (a) violating state consumer protection laws, including state laws prohibiting false advertising and the employment of other fraudulent business practices, and/or (b) wrongful conduct in the context of contractual disputes and tort actions adjudicated under state law.

The requested ruling will settle the controversy currently before the court of appeal in California concerning the preemptive scope of Section 332(c)(3)(A) of the Communications Act, as explained more fully below. Also, it will remove the potential

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<sup>1</sup> 47 C.F.R. §1.2.

<sup>2</sup> 47 U.S.C. §151, et seq.

<sup>3</sup> 47 U.S.C. §332(c)(3)(A).

uncertainty that may similarly arise amongst other state courts that have not yet addressed this issue. Thus, the requested ruling will help to prevent state courts from effectively immunizing CMRS providers from liability in connection with their contravention of state consumer protection laws and/or for breaches of contract and tortious conduct.

As the Commission is aware, ordinarily state courts are empowered to award monetary relief against businesses in connection with such acts, whether in the form of restitution or compensatory, exemplary or punitive damages. CMRS provider defendants have introduced confusion and incertitude as to whether Section 332(c)(3)(A) of the Communications Act limits state courts to award only injunctive relief against them. This practice may unreasonably serve to allow CMRS providers to violate state consumer protection laws, avoid contractual obligations and engage in tortious behavior with virtual impunity. Hence, the outcome of this petition is of critical importance to California consumers, who constitute the largest group of wireless users in the nation, and to similarly situated consumers in the vast majority of states where these issues have yet to be examined.<sup>4</sup> Thus, the requested declaratory ruling will provide much-needed and crucial guidance to numerous state courts with respect to issues of tremendous significance to consumers of wireless services, as well as contribute to judicial uniformity and efficiency throughout the nation.

**2. The Issue Requiring A Ruling From The FCC Is Whether The Communications Act Or The FCC's Jurisdiction Preempts State Claims For Monetary Relief Against CMRS Providers**

The declaratory ruling requested by this petition focuses on the issue of whether, as a matter of law, the Communications Act and/or the FCC's jurisdiction thereunder preempts state courts from awarding monetary relief to consumers against CMRS providers for violating state consumer protection, tort and/or contract laws. Thus, the FCC can issue the

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<sup>4</sup> To date, approximately twelve states have reported opinions concerning whether Section 332(c)(3)(A) of the Communications Act invests only the Commission and/or the federal courts with the authority to assess monetary damages against CMRS providers for conduct which constitutes violations of state consumer protection, tort and contract laws, as discussed more fully hereinbelow.

requested ruling without delving into the facts of any specific case now or in the future pending before a state court, including the California litigation which provided the impetus for bringing this request for a declaratory ruling before the Commission at the present time.

**3. The Impetus For The Requested Ruling Arises In The Context Of Petitioner's Allegations Of False Advertising And Other Fraudulent Business Practices Brought Against LA Cellular**

The immediate impetus for bringing this request for a declaratory ruling before the Commission at this juncture involves state court litigation in California – the results of which will ultimately be of nationwide significance – wherein the Alliance has raised allegations of false advertising and other fraudulent business practices against a CMRS provider, Los Angeles Cellular Telephone Company ("LA Cellular"). Petitioner is one of the named plaintiffs whose Second Amended Class Action Complaint, in the subject class action litigation,<sup>5</sup> alleges that LA Cellular, a major provider of wireless telephone services in Southern California, has engaged in fraudulent business practices involving, *inter alia*, a false and deceptive advertising campaign conducted by LA Cellular for over a decade. One of the cornerstones of LA Cellular's advertising, for example, revolves around LA Cellular's repeated false claim that it offers a "seamless calling area" throughout Southern California. As the complaint against LA Cellular points out, however, these advertisements are inaccurate, misleading and intentionally deceptive because there are substantial coverage gaps, holes or "dead zones" throughout LA Cellular's advertised service area of which LA Cellular is aware, yet knowingly fails to disclose to current and/or potential subscribers, or to correct, despite the serious nature of the problems engendered by these coverage gaps.<sup>6</sup>

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<sup>5</sup> The action is currently styled as Spielholz v. Los Angeles Cellular Telephone Co., No. BC186787 (hereinafter referred to as the "LA Cellular" case).

<sup>6</sup> If an LA Cellular subscriber attempts to place a call in a coverage gap, the call will not be connected. LA Cellular has knowingly failed to disclose the existence of these coverage gaps to its subscribers, the majority of whom cite "safety and security" as their primary reason for subscribing to LA Cellular's service, according to survey data published by LA Cellular itself, and would be precluded from accessing 9-1-1 – and, therefore, their means of ensuring their "safety and security" – if their 9-1-1 call attempts were made from within one of LA Cellular's coverage gaps, as occurred in connection with Marcia Spielholz.

#### **4. The Requested Ruling Will Serve To Prevent The Issuance Of Misguided State Trial Court Decisions**

The trial court's ruling in the Petitioner's case against LA Cellular shows the need for the requested ruling. Based upon an overly expansive reading of Section 332(c)(3)(A) of the Communications Act and contrary to precedent established in other state courts as well as the Commission's own pronouncements, the LA Cellular trial court recently struck all of plaintiffs' requests for compensatory and punitive damages and restitution. The trial court accepted LA Cellular's erroneous argument that the award of any form of monetary relief against LA Cellular would be tantamount to requiring the state court to "regulate rates" of a CMRS provider, an action prohibited under Section 332(c)(3)(A) of the Communications Act.

Thus, the ruling confuses "rate regulation" with an award of monetary relief against a CMRS provider that charges prices for its services which are not subject to rate regulation. In so doing, the ruling also reveals the California trial court's misapprehension of the pro-competitive purposes which Congress intended to promote via the enactment of Section 332 of the Communications Act, which are congruent with the purposes served by state consumer protection laws. Congress' purpose in enacting Section 332 of the Communications Act was to enable the forces of a free, fair and robustly competitive marketplace – as opposed to state rate regulation – to determine the prices charged by CMRS providers for their services to the benefit of consumers, unless the FCC reached the conclusion that, in a given state, such competition did not exist and, thus, could not be counted upon to ensure that the prices exacted by CMRS providers reflected the free forces of a highly competitive market. And, as the Commission itself determined, forbearance from rate regulation was desirable on the federal level as well in order to effectuate a shift in the treatment of wireless service providers from a regulated utility model to a competitive marketplace paradigm that would confer upon consumers the benefits which accrue from vigorous and healthy market competition in the form of lower prices, higher service quality and greater innovation.

Given the complexity and unfamiliarity with the applicable principles of telecommunications laws, it is no surprise that the trial court appears to have implicitly made its decision upon accepting the erroneous argument that the "Filed Rate" or "Filed Tariff" doctrine would be abrogated if the trial court were to award monetary damages against LA Cellular.<sup>7</sup> That argument lacks merit because, as the Commission is aware, CMRS providers file no tariffs with either the FCC or any state agency, and thus LA Cellular has no "filed tariff" or "filed rates" of which the trial court could run afoul.

Such state court misinterpretations of Section 332 and the concomitant misapplication of public utility legal doctrines which have no relevance within the context of the CMRS industry, reflect the concerted efforts exerted by CMRS defendants to cloud the state courts' reasoning in cases like the LA Cellular litigation, and thereby bring about untenable, self-serving results – a CMRS industry with no accountability for its violations of state consumer protection laws and/or common law contract and tort precepts. Such irrational results are unwarranted and can be remedied in the LA Cellular case and prevented from occurring in other state court cases by means of the Commission's issuance of the declaratory ruling requested herein.

**5. The FCC Can Issue The Requested Declaratory Ruling Without Delving Into The Facts Of Petitioner's State Court Litigation**

Petitioner is not asking the FCC to accept Petitioner's version of the facts alleged in the LA Cellular case to support Petitioner's claim for monetary damages before the California trial court. In fact, Petitioner is not seeking the Commission's opinion with respect to any facts at issue before the state trial court. Rather, Petitioner is simply requesting that the FCC, as the agency empowered to determine the meaning and applicability of the provisions of its enabling legislation, the Communications Act, to declare that neither the Communications

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<sup>7</sup> LA Cellular argued that the "Filed Rate" doctrine was applicable to any action by the state court, thereby: (1) precluding the court from engaging in any monetary relief award that the court could construe as rate making, a process reserved to the Commission; and (2) prohibiting an award of damages which would directly or indirectly affect LA Cellular's "filed rates," which were purportedly established as part of the Commission's regulatory oversight and rate making processes involving LA Cellular.

Act nor the FCC's jurisdiction thereunder serve to preempt a state court from awarding monetary relief against CMRS providers for violations of state consumer protection laws which prohibit, inter alia, false advertising and other fraudulent business practices, and/or in the context of contractual disputes or tort actions adjudicated in state courts involving CMRS providers. Thus, the ruling requested herein concerns principles of law which can be annunciated by the Commission without reference to the specific facts of any particular case that may be brought before a state court.

**B. Material Facts Of The LA Cellular Case**

As Petitioner has noted above, the ruling which it presently seeks from the Commission does not call for the Commission to provide an opinion concerning the facts of the case which has given rise to Petitioner's request herein. However, because it may prove useful for the Commission to understand the circumstances which have rendered the Commission's issuance of the requested declaratory ruling essential at this particular juncture, set forth below is a summary of the LA Cellular case presently before the California court.

**1. The Parties**

Debra Petcove and the Alliance are currently the named plaintiffs in the LA Cellular class action case now pending before the California trial court.<sup>8</sup>

Petcove is an LA Cellular subscriber who avers that she regularly travels through locales near her home that fall within undisclosed coverage gaps in LA Cellular's advertised service area. The Alliance is a California non-profit public benefit corporation which has been organized for the purposes of representing the interests of CMRS users throughout the nation and improving the quality of wireless telephone services. As the Commission is aware, the Alliance has spearheaded and/or participated in numerous rule making and other proceedings before the FCC aimed at enhancing the effectiveness of and public interest

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<sup>8</sup> See supra note 5.

benefits derived from wireless telephone services, particularly in connection with public access to emergency services through the use of cellular telephone communications.

The defendants in the California suit are presently LA Cellular, AT&T Wireless Services, Inc. ("AT&T Wireless") and BellSouth Cellular Corporation ("BellSouth Cellular"). Plaintiffs allege LA Cellular is a California partnership, and its general partners and/or joint venturers are defendants BellSouth Cellular and AT&T Wireless. AT&T Wireless is a Delaware corporation, with headquarters in Kirkland, Washington. BellSouth Cellular is a Georgia corporation, with headquarters in Atlanta, Georgia. BellSouth Cellular contests jurisdiction, and has not appeared in the action. Accordingly, the Real Parties in Interest are LA Cellular and AT&T Wireless.<sup>9</sup>

## **2. Substantive Allegations**

Plaintiffs allege that LA Cellular, together with its joint venturers and/or general partners, defendants BellSouth Cellular and AT&T Wireless, provide wireless radio service to consumers in Los Angeles, California and surrounding cities and counties. In widely-distributed advertisements, LA Cellular touted as its most important advantage a seamless calling area in excess of 30,000 square miles "from anywhere between the Nevada and Arizona borders to Catalina Island."

Plaintiffs allege also that LA Cellular's representations about its calling area are inaccurate, misleading and intentionally deceptive because there are undisclosed gaps, holes or "dead zones" in LA Cellular's advertised coverage area. If an LA Cellular subscriber attempts to place a call in an area that falls within one of these gaps, the call will not be connected. Knowing of the gaps in coverage in its advertised service area, LA Cellular has, nevertheless, failed to disclose the existence of these gaps to consumers.

Plaintiffs allege further that LA Cellular's representations about its calling area are inaccurate, misleading and intentionally deceptive because LA Cellular is aware that its

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<sup>9</sup> Counsel for LA Cellular informed plaintiffs on February 12, 1999 that LA Cellular is no longer a partnership. LA Cellular is now known as AB Cellular Holding, LLC, a limited liability company organized under Delaware law and doing business in California as AT&T Wireless Services.



system lacks the capacity to provide the seamless calling area it advertises, even where a gap or "dead zone" does not exist. The effective calling area provided by LA Cellular's system is limited to locations where LA Cellular has determined that it is in its best economic interests to provide service and has designed its system accordingly, investing resources and installing equipment to provide access to its service where it foresees the greatest returns on its investments. The locations within its effective calling area that LA Cellular has chosen to serve generate the greatest profit potential for LA Cellular. In other areas, where LA Cellular has determined that the potential return on its investment does not meet its desired threshold, LA Cellular has elected not to invest sufficient resources and equipment to provide adequate coverage to subscribers who may live, work or travel through those areas, knowing that, as a practical matter, subscribers will be precluded from or have significant difficulty in accessing its service within those areas.

### 3. Procedural History

The Second Class Action Amended Complaint filed by the class plaintiffs in the LA Cellular case sets forth six claims against all defendants. These claims allege false advertising, fraud and/or breach of contract.<sup>10</sup>

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<sup>10</sup> More specifically, these claims are:

(a) Violation of Business & Professions Code §17200, et seq.: for defendants' acts of continuing to knowingly disseminate in its advertisements unfair, deceptive, untrue, or misleading statements about the cellular telephones they sell, their coverage area and other conditions of their cellular service, with the knowledge that service subscribers would be unable to obtain the advertised benefits of defendants' service, is a practice which constitutes fraud, deceit and false advertising, in violation of Business and Professions Code §17200, et seq. and §17500, et seq.;

(b) Violation of Business & Professions Code §17500, et seq., for defendants' misleading and untrue statements made with the intent to sell their services and equipment to plaintiffs and all others similarly situated;

(c) Violation of the Consumers Legal Remedies Act ("CLRA"), Civil Code §1750, et seq., for defendants' deceptive practices, unlawful methods of competition, false advertising and/or proscribed acts as defined in the CLRA, specifically Civil Code §1770(a)(5) (defendants' acts and practices constitute misrepresentations that the cellular service in question has characteristics, uses and/or benefits which it does not have), Civil Code §1770(a)(7) (defendants have engaged in deceptive, untrue and/or misleading advertising that their cellular service is of a particular standard, quality, or grade, when it is of another), Civil Code §1770(a)(9) (defendants advertised their cellular service with the intent not to sell it as advertised or represented), and Civil Code §1770(a)(14) (defendants have misrepresented that a transaction confers or involves legal rights, obligations, or remedies upon plaintiffs and members of the class regarding the provision of cellular service, when it does not);

(d) Fraud and deceit for: (i) defendants' uniform misrepresentations to plaintiffs and the class that defendants' advertised calling area was seamless and that its system could be accessed anywhere by wireless phones sold and provided by defendants and their agents, when, in fact, defendants knew such representations were false; and (ii) defendants' intentional failure to disclose to plaintiffs and the class that defendants' calling area was not seamless as advertised and could not be accessed anywhere by wireless phones sold and provided by defendants and their agents;

(e) Negligent misrepresentation: for defendants' failure to fulfill their duty to disclose to plaintiffs and the class the material facts discussed herein;

(f) Breach of contract; and for

(g) Breach of the implied covenant of good faith and fair dealing.

Subsequently, plaintiffs agreed to dismiss the breach of contract and breach of implied covenant of good faith claims.

On January 15, 1999, defendants LA Cellular and AT&T Wireless moved to strike plaintiffs' claims for monetary relief on the grounds that claims that had as their remedy monetary relief are preempted by Section 332(c)(3)(A) of the Communications Act.<sup>11</sup>

Plaintiffs filed their opposition to the motion to strike on February 2, 1999, arguing that: (a) the language of Section 332 itself excluded plaintiffs' claims from those which may be subject to preemption; (b) the "savings clause" of the Communications Act, 47 U.S.C. Section 414, preserved plaintiffs' rights to assert such claims; and, (c) virtually all courts, including Tenore,<sup>12</sup> that have analyzed whether state law claims for false advertising which would involve monetary relief against a CMRS provider are preempted by the Communications Act have concluded that such claims are not preempted.<sup>13</sup>

On February 11, 1999, the trial court issued a minute order that provided:<sup>14</sup>

Motion granted. Plaintiff's allegations as to monetary damages violate the preemptive mandate of Section 332 of the Federal Communications Act. The second amended complaint recovery allegations would require the state court to regulate or adjust rates which is prohibited by Section 332.

On May 6, 1999, Petitioner filed a petition for writ of mandate<sup>15</sup> in the California Court of Appeal, Second Appellate District. The principal issue presented by the writ petition is whether Section 332(c)(3)(A) of the Communications Act preempts statutory and/or common law claims stemming from a wireless telephone company's false advertising that have as their remedy, monetary relief, including compensatory and punitive damages and restitution.

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<sup>11</sup> A copy of L.A. Cellular's motion to strike is attached to the Appendix of Exhibits in Support of Petition for Declaratory Ruling ("Appendix") Ex. 1. LA Cellular made essentially the same arguments in its reply papers, Appendix Ex. 2.

<sup>12</sup> Tenore v. A T & T Wireless Servs., 962 P.2d 104 (1998), cert. denied, \_\_\_ U.S. \_\_\_, 119 S. Ct. 1096 (1999).

<sup>13</sup> Petitioner's opposition to the motion to strike, Appendix Ex. 3.

<sup>14</sup> The trial court's minute order, Appendix Ex. 4.

<sup>15</sup> The writ petition is styled as Petition for Writ of Mandate or Other Extraordinary Relief, Appendix Ex. 5.

On May 12, 1999, LA Cellular and AT&T Wireless filed their preliminary opposition to plaintiffs' writ petition.<sup>16</sup> As in their motion to strike, LA Cellular and AT&T Wireless asserted that any award of monetary relief to plaintiffs, whether for compensatory damages, restitution, or punitive damages, would require the trial court to "enmesh" itself in impermissible rate regulation.

On June 8, 1999 the California Court of Appeal, Second Appellate District issued an Alternative Writ of Mandate staying proceedings pending further order of the court and requiring the trial court to either vacate its order entered on February 11, 1999 and make a new and different order, or alternatively, on August 10, 1999, show cause why a peremptory writ of mandate so ordering should not issue.<sup>17</sup> Upon being apprised of Petitioner's intent to seek the instant declaratory ruling from the FCC, on June 15, 1999 the California Court of Appeal issued a second order staying further proceedings in this matter pending a ruling by the FCC on a petition for a determination as to whether the Communications Act preempts state courts from awarding monetary relief as a remedy for fraud and false advertising claims. The second order noted that the court intends to defer ruling on the petition for writ of mandate pending action by the FCC.<sup>18</sup>

## **II. ARGUMENT**

### **A. The Communications Act, Its Legislative History And Interpretive FCC And Judicial Decisions Mandate That Monetary Relief For State Law Fraud Or False Advertising Claims Against A Wireless Telephone Company Is Not Preempted Because Such Relief Is Not Subject To Preemption, And In Fact Is Specifically Exempt From Preemption**

In a nutshell, preemption should not be extended to shield wireless service companies from state claims for false advertising and other fraudulent business practices.

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<sup>16</sup> LA Cellular's opposition, Appendix Ex. 6.

<sup>17</sup> The California Court of Appeal's Alternative Writ of Mandate, Appendix Ex. 7.

<sup>18</sup> The California Court of Appeal's second order, the Order Staying Proceedings, Appendix Ex. 8.

**1. Preemption Is Focused Narrowly To Prohibit States From Setting Wireless Telephone Service Prices**

Congress ended state regulation of wireless telephone service rates by amending Section 332 to substitute market determined prices for regulated rates.<sup>19</sup> Congress crafted the language of Section 332(c)(3)(A) narrowly, limiting its application to the preemption of state or local "authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services." 47 U.S.C. §332(c)(3)(A). Following the Congressional intent reflected in the legislative history of Section 332 and the language of Section 332 itself, the FCC has determined that the preemptive scope of Section 332(c)(3)(A) with respect to "the rates charged by commercial mobile services" applies to State orders "prescribing, setting, or fixing" the prices for commercial mobile services, including cellular telephone service prices.<sup>20</sup>

The regulatory rate making process involves complex proceedings which can be generally described as consisting of two major steps. First, a regulatory body is required to make a determination concerning the rate of return a utility is entitled to receive on its investment in the facilities necessary to provide the regulated service. Secondly, the recovery of the rate of return is determined by establishing the rates that are to be charged for individual services offered by the regulated utility, based upon a number of economic, policy and other considerations.<sup>21</sup>

The FCC has elected to forbear from regulating the rates of wireless service providers and, thus, does not undertake these processes in connection with commercial mobile service providers, including cellular telephone service providers like LA Cellular.

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<sup>19</sup> H.R. Rep. No. 103-111, at 211, 260 (1993), reprinted in 1993 U.S.C.C.A.N. 378, 587.

<sup>20</sup> In re: Pittencrieff Communications, 13 F.C.C.R. 1735, 1745 (1997); Cellular Telecomms. Industry Ass'n v. FCC, 168 F. 3d 1332 (D.C. Cir. 1999).

<sup>21</sup> See infra note 40, for a more detailed description of the many factors involved in the rate of making process.

Wireless telephone service prices are determined by market forces, and not set pursuant to regulatory processes administered by the FCC or any other federal or state agency. There are no regulated rates, or filed rates or tariffs with respect to CMRS providers. As a result, the "Filed Rate" doctrine, which prevents courts from second-guessing the rates established by regulatory commissions (which are "on file" in the form of tariffs), has no application to wireless telephone service companies.

Because wireless telephone service prices are market-determined, the award of monetary relief against errant wireless telephone companies are no more subject to preemption than monetary awards against a dry cleaning company that engages in false advertising or other fraudulent business practices. Monetary awards cannot impinge upon nonexistent regulated rates, and do not prescribe, set or fix prices. Consequently, state courts that issue monetary awards, no matter their form, are not enmeshed in acts proscribed by Section 332(c)(3)(A) of the Communications Act.

**2. The Narrow Focus Of State Preemption Does Not Serve To Prohibit Monetary Damage Awards In State Actions For False Advertising And/Or Other Fraudulent Business Practices – As A Matter Of Law, The Statute Preserves Plaintiffs' State Law Claims And Remedies**

Section 332(c)(3)(A) of the Act explicitly provides that it "shall not prohibit a State from regulating the other terms and conditions of commercial mobile services." The reference in Section 332 to "other terms and conditions" was intended by Congress to preserve state jurisdiction over, inter alia, consumer protection matters.<sup>22</sup> Where state law claims arise in connection with those matters which fall under the rubric of the "other terms and conditions" language of Section 332 of the Communications Act preempts neither the claims nor the award of monetary relief in connection therewith.<sup>23</sup>

In other words, monetary remedies awarded as relief for a wireless telephone company's false and deceptive advertising and/or other fraudulent business practices are not

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<sup>22</sup> H.R. Rep. No. 103-111, at 211, 261.

<sup>23</sup> Tenore, 962 P. 2d at 111, 115-16.

subject to preemption. Those remedies do not prescribe, set or fix cellular telephone service prices. Rather, such monetary remedies constitute, by virtue of FCC and congressional determination, the costs of doing business in a legally proscribed manner. The determination of liability and the calculation of the monetary remedy in connection with such liability are legally and practically distinct from the prices charged for wireless telephone service.<sup>24</sup> Furthermore, Section 414 of the Communications Act, referred to as the "savings clause," establishes and reinforces this distinction and preserves from preemption state claims involving contractual disputes, tort actions, false advertising and other fraudulent business practices.<sup>25</sup>

### **3. The Savings Clause Mandates That State Law Claims And Remedies Are Not Subject To Preemption**

That Section 332 of the Communications Act does not preempt plaintiffs' claims is supported by the "savings clause" contained in Section 414 of the Communications Act, which provides:<sup>26</sup>

Section 414. [47 U.S.C. §414] Exclusiveness of Chapter

Nothing in this [Act] contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this [Act] are in addition to such remedies.

The savings clause "clearly reflects Congress's determination that state law causes of action should not be subsumed by the Act, but remain as independent causes of action."<sup>27</sup>

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<sup>24</sup> Weinberg v Sprint Corp., 165 F.R.D. 431, 434 (1996); Bruss Co. v. Allnet Communication Servs., 606 F. Supp. 401, 411 (N.D. Ill. 1985); Kellerman v. MCI Telecomms. Corp., 493 N.E. 2d 1045, 1051, Bennett v. Alltel Mobile Communications, No. CIV. A. 96-D-232-N, 1996 WL 1054301, at \*2-\*3,\*5 (M.D. Ala. 1996); Tenore, 962 P. 2d 111, 115-16.

<sup>25</sup> See KVHP TV Partners v Channel 12, Inc., 874 F. Supp. 756, 761 (E.D. Tex. 1995), and the numerous cases cited in Petitioner's Writ of Mandate, at pages 28-29, Appendix Ex. 5.

<sup>26</sup> 47 U.S.C. §414.

<sup>27</sup> Sanderson, Thompson, Ratledge & Zimny v. AWACS, Inc., 958 F. Supp. 947, 958 (D. Del. 1997).

This interpretation, that the savings clause preserves state law claims distinguishable from those provided for in the Communications Act, has been consistently and overwhelmingly adopted by the other courts that have addressed this issue.<sup>28</sup>

The FCC has also relied upon the savings clause in holding that the Communications Act preserves the rights of parties to pursue legal remedies against telecommunications companies based upon state statutory or common law claims, including claims for false advertising, fraud, and misrepresentation.<sup>29</sup>

Reading the "other terms and conditions" clause of Section 332(c)(3)(A) in conjunction with the Communications Act's savings clause makes clear that Congress did not intend the preemptive reach of Section 332(c)(3)(A) to extend to state law claims for false advertising and other fraudulent business practices.<sup>30</sup> For example, in the Bennett case,<sup>31</sup> the plaintiff alleged that Alltel, a wireless telephone service provider, misrepresented and failed to disclose its practice of rounding up charges for airtime used to the next full minute. Upon reviewing both Section 332(c)(3)(A) of the Communications Act and Section 414, the

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<sup>28</sup> See, e.g., DeCastro v. AWACS, Inc., 935 F. Supp. 541, 551 (D.N.) (1996) ("Many courts have relied upon this savings clause to find that Congress intended to preserve state law claims for breaches of duties which are distinguishable from duties created by the Act.") (citing KVHP TV, 874 F. Supp. at 761 ("The inclusion of this savings clause is plainly inconsistent with the congressional displacement of state contract and fraud claims.")); see also Weinberg v Sprint Corp., 165 F.R.D. 431, 440 (1996) (saving clause preserves state law claims for fraud, negligent misrepresentation and consumer fraud related to telecommunications company's advertising promotions); Heichman v. AT&T, 943 F. Supp. 1212, 1220-21 (C.D. Cal. 1995) (claim under California's Unfair Business Practices Act against telecommunications company properly brought as state cause of action); Kentucky ex rel. Gorman v. Comcast Cable, 881 F. Supp. 285 (W.D. Ky. 1995) (state claim under consumer fraud statute alleging unlawful practice of billing customers for certain services not pre-empted by the Communications Act); Cooperative Communications v. AT&T Corp., 867 F. Supp. 1511, 1516 (D. Utah 1994) (state remedies not in conflict with the Communications Act are preserved by Section 414); Financial Planning Inst. v. AT&T Co., 788 F. Supp. 75, 77 (D. Mass. 1992) ("[B]y enacting the savings clause, Congress specifically provided for the preservation of existing statutory and common law claims in addition to federal causes of action.").

<sup>29</sup> See Richman Bros v. U.S. Sprint Communications Co., 10 F.C.C.R. 13639, 1364-42 (1995); In re: Operator Servs. Providers of Am., 6 F.C.C.R. 4475, 4477 (1991).

<sup>30</sup> Tenore, 962 P.2d at 117.

<sup>31</sup> Bennett, 1996 WL 1054301, at \*1.